IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

FRIDAY, THE 2ND FEBRUARY 2007 / 13TH MAGHA 1928

CMA.No. 116 OF 2002()

AS.54/2000 OF III ADDL.SUB COURT, KOZHIKODE
OS.381/1996 OF PRL.MUNSIFF'S COURT,KOZHIKODE-II

APPELLANT/ RESPONDENT/ PLAINTIFF:

CHURAKKAT DIVAKARAN, S/O. APPUKUTTY,
RESIDING AT CHOORAKKAT,
NEELESWEARAM AMSOM, AND DESOM, KOZHIKODE.

BY ADV. SMT.SREELEKHA PUTHALATH

RESPONDENT /APPELLANT/ DEFENDANT:

EDAKKT ASHOKAN, S/O. UNICHOYI,
RESIDING AT NEELESWARAM AMSOM,
KOZHIKODE.

BY ADVS. M/S. V.K.BALACHANDRAN & S. SHYAM.

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 2.2.2007, THE COURT ON THE SAME DAY, DELIVERED THE FOLLOWING:

CMA NO. 116/2002

ORDER ON CMP NO. 2682/2002 IN C.M.A. 116/2002

// DISMISSED//

2ND FEBRUARY, 2007. **SD/-**
P.R. RAMAN, JUDGE.

// TRUE COPY //

P.S. TO JUDGE.

knc/-

P.R. RAMAN, J.

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C.M.A. NO. 116 OF 2002

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DATED THIS, THE 2ND DAY OF FEBRUARY, 2007

J U D G M E N T

This appeal is at the instance of the plaintiff who instituted O.S. 381/1996 before the principal Munsiff's Court, Kozhikode, II.

2. The suit was for mandatory as well as prohibitory injunction, which was eventually decreed, against which an appeal was preferred by the defendant as A.S. 554/2000. The appellate court remanded the case after raising certain additional issues and after finding that the property has not been identified, without which a decree could not be executable. Aggrieved thereby, the present appeal is preferred.

3. Briefly stated, the plaint averments are as follows: Plaint A schedule property belongs to the plaintiff. Plaint B schedule property belongs to the defendant. Originally, plaint B schedule also belonged to the plaintiff. However, subsequently, he sold 10 1/4 cents of his property in favour of one Appunni some 20 years back and that property has now come into the ownership and possession of the defendant, which is described as plaint B schedule. The remaining property, which the plaintiff

acquired as per document NO. 594/1964 is in his ownership and possession, which is described as plaint A schedule. At the time of sale of plaint B schedule property, an extent of six metres length and 5 feet width of the property was kept apart to enable the plaintiff to have access to his property on the southern side from his property on the northern side and it is the only means to access from the northern side of plaint A schedule property to its southern side. The said property is described as plaint C schedule. The plaint schedule properties situate on the slope of a hill and there is a panchayath road on the western side of plaint A and B schedule properties. On the eastern side of plaint C schedule, lies the property belonging to one Raghavan and which is at a level of 5 feet higher than plaint C schedule property. Earlier, plaint C schedule property was lying at a level of 5 feet higher than plaint B schedule property. There was a side wall constructed to protect the property. But one month prior to the institution of the suit, the defendant started construction of a house in plaint B schedule property after removing earth from northern and eastern portions of the property about 15 feet depth and brought it to the same level as that of the road on the western side. Though in the beginning he removed earth from his property only after leaving a gap of 3 feet from the northern and eastern boundaries subsequently, he removed the entire earth from portions of the property adjacent to the boundaries of plaint B and C properties and

subsequent to the filing of the suit, C schedule property collapsed. As a matter of fact, it was during the pendency of the proceedings that subsequent removal of the earth by the defendant resulted in the collapse of plaint C schedule property and therefore, the plaint was amended contending that the plaintiff could not enter the southern portion of A schedule from 15.6.1996 onwards and take usufructus therefrom and cultivate the property. A damage of Rs. 40,000/- was also claimed to compensate the loss and it is also contended that the defendant is liable to restore plaint C schedule to its original condition.

4. The prayer in the suit was for a mandatory injunction and for a direction to the defendant to construct a wall on the northern and eastern boundaries of plaint B schedule property. A prohibitory inunction was also sought for restraining the defendant from trespassing into plaint A and C schedule properties and committing any waste therein or removing earth therefrom.

5. The defendant admitted that the plaint schedule properties were lying together as a single property and the properties were acquired on behalf of the plaintiff by his father as per document No.597/64. However he denied the other allegations. According to him, the plaint schedule properties are lying on the slop of a hill. There is a panchayath road on the western side of plaint B schedule property and in order to construct a house

in the said property, it became necessary to level the property after removing earth and that out of the properties acquired by the plaintiff 11 1/2 cents were assigned in favour of one Vasu and Vasu in turn, assigned the same to Balan who is the son of the brother of the plaintiff's father. The defendant purchased the property from Balan for construction of a house and according to him, even before the property was purchased by him, Balan had removed earth from the property and leveled it. Balan had given 1 1/4 cents of property to the plaintiff to provide lateral support to his property. The defendant has purchased only the remaining property. The eastern boundary of the property of the plaintiff is shown as the remaining property which is in the possession of Raghavan. The same property is shown as the boundary in document No. 1130/77 and 3375/95. The property described in plaint C schedule is part of the property belonging to Balan. He has not removed any earth from the property after he purchased the same from Balan. Balan is a necessary party. The defendant has no objection in constructing any wall to provide lateral support to the plaintiff's property. Plaintiff has recently constructed a granite wall on the western and southern sides of plaint C schedule property and no granite wall existed there earlier. The suit is liable to be dismissed. In the additional written statement filed by the defendant, he denied the entire statement made by way of amendment. According to him, plaint C schedule does not belong

to the plaintiff and that is a property kept apart by Balan for providing lateral support to the property of Raghavan. When the commissioner inspected the property, plaintiff was not willing to measure the properties.

6. The trial court framed necessary issues. The evidence in the case consists of PWs 1 to 4 and Exts.A1 to A4 on the side of the plaintiff and DWs 1 to 3 and Exts.B1 and B2 on the side of the defendant. Exts. C1, C1 (a) and C2 were also marked in the case.

7. The trial court on an analysis of the matter came to the following finding: The property acquired by Balan from Vasu is described in Ext.B1 document as "

The extent of the property is shown as 4.752 Ares (11 1/2 cents). Ext. B2 is the copy of the document by which the defendant acquired the property from Balan wherein the description of the property is as follows:

8. From the recitals contained in Exts. B1 and B2 documents the court below found that the extent of the property in Ext.B2 is 10 1/4 cents out of the total extent of 11 1/2 cents and that the balance 1 1/4 cents of property was given for widening the road, going by the recitals contained in Ext.B2 document itself. Therefore, the plea of the defendant that 1 1/4

cents of property was given by Balan to the plaintiff for providing lateral support to the adjacent property was rejected. The defendant has no case that he had acquired any right over plaint C schedule property. PW.3 Balan has also stated that he has no right over that property and that belongs to the plaintiff. Admittedly, the property on the eastern side of plaint C schedule belongs to one Raghavan who was examined as DW.2. He had no case that he had any right over the property described in plaint C schedule. In these circumstances, the only inference possible is that plaint C schedule belongs to the plaintiff which forms part of plaint A schedule property. It was in this context that the trial court found that the fact that the commissioner has not measured the property is of no consequence. Admittedly, the property situates in the slop of a hill. Even in the written statement, it is admitted that for the purpose of construction of house, some earth was removed. The commissioner on his inspection, found that the removal of earth was very recently done. On a subsequent visit, he found that plaint C schedule property is completely collapsed and damaged on account of the removal of earth from the property. There is absolutely no dispute in the case that plaint A and C schedule properties needed lateral support from plaint B schedule property and that removal of earth from plaint B schedule property would damage those properties. Even DW.1 admitted that the property requires lateral support and a portion of plaint C schedule is collapsed.

But according to the defendant, the removal of earth was not done by him, but it was done by Balan. On the facts and on the basis of the commission report, the trial court found that earth was removed from plaint B schedule property for the construction of the house by the defendant and thus he destroyed the lateral support to plaint A and C schedule properties and hence he is liable to restore plaint C schedule in its original condition. A decree of prohibitory injunction restraining the defendant from further removing any earth so as to affect the lateral support of plaint A and C schedule propertieis was also granted. It was also found that the defendant is liable to construct a granite wall along the boundary of his property at the sides of plaint A and C schedule properties to give lateral support to those properties. The trial court, however, did not grant any decree by way of damages and the plaintiff did not file any appeal.

9. In the appeal filed by the defendant, however, the appellate court found that in the absence of any plan appended to the decree, there is only the description of the properties in the plaint schedule for identification and therefore, restoration of plaint C schedule to its original position as well as construction of the wall along plaint B schedule property, as decreed is not correct. Therefore, the trial court was not justified in decreeing the suit for restoration of plaint C schedule to its original position as well as construction of the wall for support along the boundaries of plaint B

schedule. According to the appellate court, plaint C schedule is described without any survey numbers and boundaries of C schedule is shown as Raghavan's property and the plaint schedule apparently do not give necessary details with correct identification of plaint schedule properties as required by law. But the appellate court failed to see that there was absolutely no dispute between the parties regarding the identity of the property. Both the plaintiff and defendant have understood the identity and the lie of the properties. The plaintiff's contention that plaint B schedule originally belonged to him and subsequently, he sold it to one Vasu from whom defendant purchased the same, is admitted by the defendant. Plaint A schedule property belongs to the plaintiff is beyond dispute. It is contended that plaint C schedule still belongs to Balan. But Balan, who was examined as PW.3 had no such case. On the basis of the recitals contained in Ext.B2 document, the contention of the plaintiff that 1 1/4 cents of land was set apart for road by Balan stands proved. The contention of the plaintiff that the only way to his property from north to south is through C schedule property and that C schedule property and the property belonging to Raghavan were on the same level about 4 feet high is not anywhere disputed by the defendant. It was found by the trial court that C schedule property was collapsed. Raghavan himself was examined in this case as DW.2 who did not dispute the identity of plaint C schedule property.

There is a rough sketch prepared along with the commissioner's report. In these circumstances, there was no warrant for the appellate court to found that there was no proper identification of the property.

10. In this connection, this Court in **Kunju Kunju Chandran v. Raghavan** (2003 (5) KLT 644), more or less in a similar situation, held that 'even if the descriptions are insufficient in the decree, as well as in the judgment, the execution court shall rely on the other documents available on record and construe the decree in the true sense of the case as allowed by the trial court, so that the decree could be executed for the benefit of both the parties'.

11. I am referring to this decision only for the purpose to show that merely because a plan is not prepared, there is no reason to hold that the property is not identified as such, especially when there are other available evidence in the case to satisfy the plaint schedule description. It is for the appellate court in such circumstances to consider whether there was any dispute regarding the identity of the property at all and if so, whether the property could be identified with the available evidence on record. Without doing that, merely because a plan was not appended, it was not proper for the appellate court to remand the case for that purpose. Even if any plan was required to be submitted, the same Commissioner could have been deputed and a plan could have been got prepared and then considered the

issue on merits. The finding of the court below that there is serious dispute regarding the identify of the property is contrary to the pleadings in the case. There was no dispute regarding the identity of the property when C schedule does not belong to Balan. The appellate court also failed to appreciate the evidence of Balan who was examined as PW.3 and the recitals contained in Ext.B2.

12. In such circumstances, the finding of the appellate court without referring to such evidence is clearly wrong. The additional issues as framed by the appellate court is based on such premise that there is dispute regarding identity of the property. As regards plaint A and C schedule properties, admittedly plaint A schedule belongs to the plaintiff. Regarding C schedule also there was no claim made by the defendant that it belongs to him and all that he contended is that C schedule belongs to Balan. On the available evidence it could not have been said that there was any dispute regarding the identity and ownership of plaint C schedule. At any rate, it was for the appellate court to re-examine the evidence on record and decide the issue on merits. There was no necessity to frame any additional issue. As regards the lateral support, it was the admitted case of the parties that lateral support is required for plaint A and C schedule properties. Therefore, there was no necessity to frame any such additional issues.

13. In the result, it has to be held that the appellate court was not right in law in remanding the case to the trial court. The judgment and decree of the appellate court is set aside and the matter is remanded for a fresh consideration in accordance with law. In case the appellate court finds that the plan ought to have been appended along with the commission report, it is open to it to call for such a plan by appointing the same commissioner or by appointing another commissioner and dispose of the case in accordance with law. The parties shall appear before the court below on 5.3.2007.

Send the records immediately.

P.R. RAMAN,
JUDGE.

knc/-

P.R. RAMAN, J.
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C.M.A. NO. 116 OF 2002

J U D G M E N T

2ND FEBRUARY, 2007.